United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

75-1133

B Pfs

To be argued by
ARTHUR M. GURFEIN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs

JAMES ERNEST MANNING,

Defendant,

STUYVESANT INSURANCE CO.,

Surety-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT,
STUYVESANT INSURANCE COMPANY

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QUESTION PRESENTED

Did the District Court abuse its discretion in remitting only $2,000 of the $20,000 bail forfeiture herein under the facts and circumstances of this case?

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (the Hon. John M. Cannella) entered March 24, 1975 forfeiting the sum of $18,000 of a bail bond of $20,000 pursuant to Rule 46 of the Federal Rules of Criminal Procedure after motion by the plaintiff for judgment, and cross-motion by the appellant-surety, STUYVESANT INSURANCE COMPANY, for remission of the forfeiture.

STATEMENT OF FACTS

The defendant James Ernest Manning was indicted in the Southern District of New York of the United States District Court for violation of Title 21, U.S. Code, Secs. 173 and 174 (A-12).

On October 16, 1968, the appellant, STUYVESANT INSURANCE CO., posted an appearance bond in the amount of $20,000 (A-18).

On May 12, 1969, the defendant appeared ready for trial but, before a jury was selected or any proceedings had begun, the defendant's attorney, ALVIN GELLER, ESQ., asked for and obtained an adjournment until the following day due to the

attorney's illness (A-29).

The defendant failed to appear on the next day and a warrant for his arrest was signed on May 13, 1969 (A-20).

On May 16, 1969, an application for forfeiture of the bond was granted by the Court below but execution was stayed by the Court until May 29th (A-35).

Thereafter, on May 29, 1969, a further stay of execution on the forfeiture was denied by the Court (A-38) and an Order forfeiting the bail was signed by Hon. J. M. Cannella on June 4, 1969 (A-39).

On September 16, 1969, the defendant was arrested by the U.S. Marshal (A-20) who located the defendant from information supplied by the appellant's agent, Jack Meyer (A-64).

The defendant was tried and a jury returned a verdict of guilty on October 14, 1969. The defendant was sentenced on November 18, 1969 to a term of twelve (12) years (A-53) and said judgment was affirmed on appeal on November 20, 1973 (A-79).

The defendant moved the Court to vacate and set aside the bail forfeiture order of June 4, 1969 (A-40) but the motion was denied in an opinion dated November 20, 1969 by Judge Cannella (A-49).

The defendant appealed the order denying the motion

to vacate the forfeiture (A-54) and a hearing was held on December 18, 1969 at which the appellant-surety's agent, Jack Meyer, testified as to his efforts in locating the defendant which resulted in the defendant's being arrested (A-64-67).

The plaintiff herein moved for judgment on forfeiture of the bond on January 16, 1975 (A-81) and a cross-motion was made by the surety on January 16, 1975 for full remission of the forfeiture of the bail bond (A-87).

A memorandum and order dated March 11, 1975 and entered March 24, 1975 was handed down by the Court below in which remission of only $2,000 of the $20,000 bail forfeiture was granted (A-115-19).

Thereupon, the appellant herein filed its notice of appeal (A-120).

The plaintiff has not been put to any additional expense nor has it suffered any prejudice by reason of the failure of the defendant to appear for trial on May 13, 1969.

The defendant was apprehended and arrested solely through the efforts and at the expense of the appellant-surety's agent, Jack Meyer (A-64-67).

A R G U M E N T

POINT I

UPON THE FACTS IN THIS CASE JUSTICE DOES NOT REQUIRE THE ENFORCEMENT OF THE FORFEITURE.

The cross-motion for relief brought by the appellant to remit the forfeiture of the bond is grounded upon Rule 46, sub-division (e)(4) of the Federal Rules of Criminal Procedure, which provides:

> "(4) Remission. After entry of such judgment (of default) the Court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in Para. (2) of this subdivision."

The said paragraph (2) provides that:

> "(2) Setting Aside. The Court may direct that a forfeiture be set aside, upon such condition as the Court may impose, if it appears that justice does not require the enforcement of the forfeiture."

These Sections, under the present Rule, gives the Court discretion to look at all of the facts in a case before deciding on forfeiture. The decision must be based on sound discretion and should not be arbitrary. Smaldone v. U.S., 211 F.2d 161 (10th Cir. 1954).

It has been clearly enunciated in cases on this point that the success of the surety in producing the defendant and

the efforts expended to obtain that result are the two factors, or prerequisites, for the District Court to find that justice does not require forfeiture. Sifuentes v. U.S., 74 F.2d 620 (8th Cir. 1967).

The fact that a defendant may have wilfully defaulted does not deprive the Federal District Court of its discretion to give relief to sureties in criminal cases. United States v. Davis, 202 F.2d 621, cert. denied, 345 U.S. 998 (7th Cir. 1953).

In United States v. Egan, 394 F.2d 262, 266-67 (2nd Cir. 1968), the Court stated:

> "Under the circumstances of this case we conclude that there was no abuse of discretion. Stuyvesant presented no basis whatever for the trial court to hold 'that justice does not require the enforcement of the forfeiture.' It has never produced the defendants nor has it said what effort it is making, if any, to find and produce them."

In the instant case, it was solely through the efforts of the surety that the defendant was traced, located and subsequently arrested by the United States Marshal upon information supplied by the Surety (A-64-67).

One of the basic factors the Court must consider regarding forfeiture, as stated in United States v. Fook Dan Chin, 304 F.Supp. 403, is the appearance of the accused to answer the

indictment. That is precisely what the Surety accomplished in the present case through the expenditure of a considerable amount of time and money. The incentive to the surety for its efforts is the likelihood of the setting aside or remission of the forfeiture. The interests of justice are better served by the apprehension of the malefactor rather than the payment of money to the government.

In U.S. v. D'Argento, 227 F.2d 596, reversed on other grounds 339 F.(2d) 925 (7th Cir. 1964), the Court also took note that an element to be considered as to whether justice does not require forfeiture is the extent or degree of prejudice and expense suffered by the government as a result of the defendant's failure to appear. In the present case, the Government suffered no prejudice to its position and submitted no evidence of actual expense by reason of the failure to have witnesses or evidence available at the delayed trial. The defendant, Manning, was duly tried, convicted and is serving his sentence.

Also, in Fook Dan Chin, supra, regarding the proper exercise of discretion by the Court, a factor that was considered is whether the Government incurred additional expense as a result of the defendant's failure to appear. Larson v. U.S., 296 F.2d 167 (8th Cir. 1961). Nowhere in the record of the

present case is there any evidence that the defendant's failure to appear resulted in any additional expense to the Government.

To summarize the foregoing considerations under the facts and circumstances of the present case:

a) The defendant was arrested solely through the efforts and at the expense of Appellant;

b) The Government was in no way prejudiced by the trial delay and all witnesses were available at the later trial date;

c) The defendant's failure to appear was at a time prior to the commencement of trial and before a jury was selected and resulted in no documented expense to the Government.

It is the position of the Appellant that the Court abused its discretion in remitting only $2,000 of the $20,000 bail by setting up a procedure and standard that is not part of Rule 46 of the Federal Rules of Criminal Procedure. At the hearing held on December 18, 1969, the Court stated that the basis for denying the motion to vacate the order of forfeiture was that the surety had not requested additional time on May 29, 1969 in which to locate and apprehend the defendant (A-76). The Court acknowledged that had such a request been made that

> "...then I would be sympathetic to such an approach and I would undoubtedly, in my mind, grant it. Now, no

> such application was made that I'm aware of. In other words, the 29th <u>was the end of the road</u>." (Emphasis added)

In fact, it was not the "end of the road" in the present case insofar as the efforts of the surety were concerned, but just the beginning. As stated under oath by the surety's agent, Jack Mayer (A-64-66), a great deal of time and money was spent <u>after</u> May 29th by the surety. If the surety had accepted the Court's cut-off date and had made no further efforts, the defendant would most likely not have been apprehended at all and justice would, indeed, have suffered.

What practical purpose was served by the fixing of the date of May 29, 1969 as the "end of the road" in regard to forfeiture? In fact, it was only slightly more than two weeks after the defendant failed to appear and surely not sufficient time for the surety to have traced him as the facts of the case substantiated (A-64-67).

According to the Court below, it was not the additional time that the surety required to locate the defendant that led it to order forfeiture, but the fact that the surety failed to make a formal request for same (A-76).

While the Supreme Court recognized that remission is an act of grace, it looks favorably upon the actual holding of

the trial. U.S. v. Mack, 295 US 480 (1935). When a Surety makes a real and actual contribution to this end, the Court is obliged to consider it. U.S. v. Kelley, 38 F.R.D. 320 (DC Colo. 1965).

In fact, when the Court below formally forfeited bail on May 20, 1969, it stated that if and when the defendant was brought back to court it would entertain a motion to vacate forfeiture (A-76). Under these facts there was no reason for the surety to expect that after months of diligent effort to find the defendant that a motion to vacate forfeiture would be denied. The surety succeeded in its efforts and yet the Court below granted only a remission of $2,000 on a $20,000 bond.

The true measure of the abuse of discretion by the Court below in remitting only $2,000 must be viewed in the light of two periods of time, (1) from May 13, 1969 to May 29, 1969 and (2) from May 29, 1969 to September 16, 1969. It appears abundantly clear from the language used by the Court on December 18, 1969 that if the defendant had been apprehended within the aforesaid first period of time, an order to vacate the forfeiture of bail would have issued (A-67). However, no such order would issue even though the defendant was apprehended during the second time period unless the surety had first requested the

additional time. It is appellant's belief that there is no rational basis for this distinction and condition precedent. If the Government has been prejudiced by the failure to apprehend the defendant or its case has been weakened as a result of the delay in trial, or it has incurred additional expense, then justice might require the forfeiture regardless of when the defendant is apprehended or whether an extension of time was requested. In the present case, neither the time of apprehension nor the failure to request an extension had any adverse effect on the Government.

CONCLUSION

The $20,000 bail forfeiture should be remitted in whole or in substantial part.

Respectfully submitted,

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